U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. SERINO and U.S. POSTAL SERVICE,
POST OFFICE, Lynn, MA

Docket No. 99-506; Submitted on the Record;
Issued October 6, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record in the present appeal and finds that the Office abused its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the decision dated August 5, 1998 in which the Office denied appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated May 9, 1997 and the filing of appellant's appeal on November 5, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[3] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for

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[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed. Section 501.2 provides that the Board's review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. The Board is unable to consider evidence for the first time on appeal; *see Marlene K. Cline*, 43 ECAB 580 (1992).

[2] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b)(1) and (2).

further consideration under section 8128(a) of the Act.[4] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5] Furthermore, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[6]

In the instant case, on March 26, 1987 appellant, then a 31-year-old mail carrier, sustained an employment-related left knee strain with subsequent patellar femoral arthritis. He stopped work on August 24, 1987 and has not worked since. By decision dated May 13, 1994, the Office found that appellant no longer suffered residuals of the employment injury and terminated his wage-loss compensation, effective May 29, 1994. Appellant, through counsel, requested a hearing and, in a decision finalized on October 11, 1994, an Office hearing representative remanded the case to the Office to resolve a conflict between appellant's treating physician, Dr. John Walsh, a Board-certified orthopedic surgeon and Dr. John Duff, who had provided a second opinion evaluation for the Office.

On November 17, 1994 the Office referred appellant to Dr. James S. Hewson, a Board-certified orthopedic surgeon, who provided a report dated December 12, 1994. On September 15, 1995 the employing establishment offered appellant a limited-duty position, based on the restrictions provided by Dr. Hewson. By decision dated November 1, 1996, the Office terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work. Following his request for a review of the written record, in a May 9, 1997 decision, an Office hearing representative affirmed the prior decision. On May 7, 1998 appellant, through counsel, requested reconsideration and submitted additional argument and evidence. By decision dated August 5, 1998, the Office denied appellant's reconsideration request. The instant appeal follows.

In his May 7, 1998 reconsideration request, appellant's counsel contended that the Office erred in crediting the opinion of Dr. Hewson, the impartial medical specialist, because Dr. Hewson did not review the job offer. The record in this case, however, indicates that, while Dr. Hewson did not review the specific job offered to appellant, the position was tailored to fit the restrictions provided by him. Counsel, however, also argued that the medical evidence established that appellant could not drive to the location of the offered position.

The Board finds that the Office committed an error of law when it rejected appellant's argument that his injury prevented him from traveling from his home to the proposed place of employment as the question of whether he could drive from his home to his place of employment is a medical question which should be decided by a physician. The record in this case includes a treatment note dated September 24, 1996 in which appellant's treating Board-certified orthopedic surgeon, Dr. Walsh, advised that prolonged driving aggravated appellant's symptoms

[4] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[5] 20 C.F.R. § 10.138(b)(2).

[6] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

and, in an October 3, 1996 report, he advised that appellant could not drive "long distances." The Office impermissibly ignored Dr. Walsh's opinion that prolonged driving would aggravate appellant's symptoms and substituted the immaterial element of the type of vehicle appellant should or could drive. As appellant has shown an error in a point of law as applied by the Office, the Office improperly denied his request for reconsideration.[7]

The decision of the Office of Workers' Compensation Programs dated August 5, 1998 is hereby set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
October 6, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

[7] The Board notes that, although appellant submitted additional medical evidence with his reconsideration request which consisted of a page of treatment notes from Dr. Walsh, in the only note not previously of record, that dated April 8, 1997, Dr. Walsh merely advised that appellant was unchanged orthopedically.